UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD BEFORE THE DIVISION OF JUDGES

CENTURY BUFFET AND RESTAURANT, INC., D/B/A BEST CENTURY BUFFET, INC. AND CENTURY BUFFET GRILL, LLC

Respondent

and Case 22-CA-29242

LOCAL 318 RESTAURANT WORKERS' UNION

Charging Party

OPPOSITION TO RESPONDENT'S MOTION TO REOPEN RECORD ON BEHALF OF THE ACTING GENERAL COUNSEL

Bert Dice-Goldberg Counsel for the Acting General Counsel National Labor Relations Board Region 22 20 Washington Place – Fifth Floor Newark, NJ 07102 (973) 645-3536 The Acting General Counsel respectfully requests that the National Labor Relations Board, "the Board," deny the Motion to Reopen the Record filed on September 23, 2011 by Century Buffet and Restaurant, Inc., d/b/a Best Century Buffet, Inc. and Century Buffet Grill, LLC, "Respondent," in the above-captioned matter, on the basis that the Motion is untimely, the documents Respondent is attempting to introduce in evidence are not relevant, the documents, even if credited, would not have led the Administrative Law Judge, "the ALJ," to alter his conclusions, Respondent has not shown it was unable to produce all of the documents at trial and on the basis of the following:

- 1. Based upon a charge filed by Local 318 Restaurant Workers' Union, "the Union," on December 9, 2009 and a first amended charge filed on January 7, 2010 (GCX 1(a) and (c)), the Regional Director for Region 22, issued a Complaint and Notice of Hearing on May 24, 2010, alleging Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended, "the Act" (GCX 1(e)).²
- 2. Pursuant to the Notice of Hearing, a hearing in this matter was held before ALJ Steven Davis on August 3 and 4, November 18 and December 9, 2010.
- 3. In its brief to the ALJ, Respondent attached proposed corrections to the hearing transcript and requested the ALJ reopen the record to admit the Affirmation of one of the Acting General Counsel's witnesses, Li Xian Jiang, "Jessica," clarifying her deposition testimony in a wage and hour lawsuit against Respondent in which she is a plaintiff.

¹ Reference to "GCX" denotes exhibits offered into evidence at the administrative hearing by the Acting General Counsel; "ALJD" denotes pages in the ALJ's Decision and Recommended Order; "Motion" denotes pages of Respondent's Motion to Reopen Record; "Resp. brief" denotes pages in Respondent's Brief in Support of its Exceptions to the ALJ's Decision; "RX" denotes exhibits offered into evidence by Respondent; "Tr." denotes pages in the hearing transcript.

At hearing, the Complaint was amended to include the entities named in the caption above: Best Century Buffet, Inc. and Century Buffet Grill, LLC (Tr. 283, 348-50).

- 4. The ALJ issued his Decision and Recommended Order on May 2, 2011. The ALJ denied Respondent's request to reopen the record, indicating that the Affirmation proffered by Respondent would not change his findings regarding Jessica's credibility (ALJD pg. 14, fn. 14). The case was transferred to the Board on May 2, 2011.
- 5. On June 2, 2011, the case was referred to the Board's Alternate Dispute Resolution procedure, "ADR." The case was removed from ADR on June 28, 2011 and returned to the Board.
- 6. Respondent filed Exceptions to the ALJ's Decision on July 26, 2011. Attached to its Brief in Support of Exceptions were four exhibits Respondent sought the Board to consider: Exhibit A.) a two page hand-written document in Chinese and English purportedly written by Union Organizer Fong Chun Tsai, "Tony," together with a one page affirmation of translation; Exhibit B.) Jessica's two page Affirmation and a two page letter, dated January 10, 2011, from Respondent's Counsel to Counsel for the Plaintiffs in the wage and hour action; Exhibit C.) a three page subpoena to Zhao Nuen Wang, Jessica's husband, to testify in the wage and hour case along with a three page letter, dated March 11, 2011, from Respondent's Counsel to Counsel for the Plaintiffs in the wage and hour action, and Exhibit D.) the Certificate of Change and Certificate of Incorporation from the New York State Department of State for 88 Auto Security & Sound, Inc. (Respondent's Brief in Support of its Exceptions and its accompanying exhibits are attached herein as AGC's Opposition Exhibit 1).

³ Respondent did not move to the ALJ to have entered into the record its Exhibit C, attached to its Brief in Support of Exceptions, the subpoena to Zhao Nuen Wang and March 11, 2011 letter from Counsel for Respondent to Counsel for the Plaintiffs (Resp. brief pgs. 20-21 and its Exhibit C). Respondent has now failed to move to the Board for inclusion of these documents into the record. Therefore, even if the Board grants Respondent's Motion to Reopen, these documents and Respondent's arguments in its Brief in Support of Exceptions which are allegedly supported by those documents should be stricken. (Resp. brief pgs. 20 - 21; Exhibit C, attached thereto.)

- 7. Respondent indicated in its Brief in Support of Exceptions that it intended to file a Motion seeking to reopen the record in this matter to admit its attached documents (Resp. brief pg. 5, fn. 1).
- 8. On August 3, 2011 the Board granted the Acting General Counsel's request for an extension of time to file its Answering Brief. The Acting General Counsel filed his brief on September 20, 2011.
- 9. On September 23, 2011 Respondent filed its Motion where it, yet again, seeks to reopen the record (Respondent's Motion and its accompanying exhibits are attached herein as ACG's Opposition Exhibit 2).
- 10. The Board's rules require, prior to the Board issuing its Decision or Order, that parties file motions promptly and within such time so as not to delay the proceedings. Board Rules and Regulations Sections 102.24(a); 102.48(d)(1). Respondent did not file its Motion to Reopen the Record until September 23, 2011; two full months after it filed its Exceptions and Brief in support thereof. Respondent's failure to file its Motion in a timely manner has caused undue delay, consistent with Respondent's attempt to reopen the record before the ALJ issued his Decision. Therefore Respondent's Motion to Reopen the Record should be rejected.
- 11. Respondent now seeks to reopen the record to admit five Exhibits: the Certificate of Incorporation and Certificate of Change of 88 Auto Security & Sound, Inc. (Motion Exhibits A and B); Jessica's W-2 forms from 2007 through 2009 of (Motion Exhibit C); Jessica's 2009 Unemployment Insurance records (Motion Exhibit D); and a handwritten document purportedly

written by Tony (Motion Exhibit E).4

- 12. A party requesting the Board to reopen the hearing must show that if the offered evidence was credited it would require a different result in the case. <u>In re Raven Service Corp.</u>, 331 NLRB 651, 657-58 (2000,) citing Board Rules Section 102.35(8) and 102.48(d)(1). Respondent has failed to meet this standard.
- 13. The corporate records of 88 Auto Security & Sound, Inc., the business where Jessica's husband worked, are not material to the instant matter, are irrelevant to the ALJ's credibility findings and are so completely tangential that the Board should reject Respondent's Motion to include them in the record (Motion Exhibits A and B).
- 14. Respondent contends that these documents shed light on Jessica's credibility (Motion pg. 4, paras. 16 and 17.) The critical credibility issue between Jessica and Respondent's Owner, Ko Feng Yeung, "Peter," concern Jessica's unlawful discharge. The issue was whether Jessica asked for two weeks leave, as she testified, or an indefinite leave, necessitating her replacement, as Peter stated (Tr. 230-31, 251-52, 256, 406-07). The record contains the transcript of a tape recording of their conversation which definitively shows that Jessica specifically asked for two weeks off from work (GCX 22 at pg 1-2.) The ALJ appropriately credited Jessica (ALJD 13-15, 22-23).
- 15. Even if the ALJ had considered Respondent's newly proffered documents, and even had he credited them, the documents would not have altered his credibility findings or his conclusion that Respondent unlawfully discharged Jessica. Nothing Respondent now offers would change that determination.

⁴ Contained in the electronic case file in this matter is a document labeled EXH.22-CA-029242.Exhibit_F_Shipp_Order{1}.PDF, an order in the wage and hour suit against Respondent. Respondent failed to move to
reopen the record to include this document and failed to mention the document in either its Motion or its Brief in
Support of Exception. The document should not be made part of the record in this matter and should not be
considered by the Board.

- 16. Respondent argues that Jessica's W-2 forms impact her credibility (Motion pg. 5, paras. 18 20; Motion Exhibit C). Respondent's argument that Jessica held other jobs during her tenure with the Employer is completely irrelevant to the Board proceeding. These documents do not disprove Jessica's testimony that she worked for Respondent 5 to 6 days per week 12 or 13 hours per day. They merely indicate that she also worked elsewhere. It is completely possible that Jessica worked another 12 or 13 hours per day one or two days per week for those Employers. Even if the W-2s were credited and the ALJ relied upon them they would not call for a different result. All three of the Acting General Counsel's employee witnesses testified that they worked 12 13 hours per day, 5 or 6 hours per week prior to Respondent's unlawful changes (ALJD 9-10, 20-21; Tr. 128, 147, 151, 185, 210, 225, 267-68). The ALJ would not have reached a different conclusion even had these documents been submitted and credited. At most these documents could be relevant in a compliance proceeding.
- 17. Respondent also seeks to reopen the record to adduce Jessica's unemployment records (Motion Exhibit D). These documents have no relevance and should not be admitted. Even in a compliance proceeding, the Board has a long-held policy of not offsetting backpay with unemployment benefits. Superior Protection, Inc., 347 NLRB 1197 (2006). Nor does the Board enforce New York State law regarding unemployment benefits. As these documents have at most a tangential relationship to Jessica's credibility, reopening the record to admit them would in no way have caused the ALJ to reach a different result. The Board should not reopen the record to admit them.
- 18. Respondent has made no showing that the documents it claims were written by Tony became available after the close of the hearing or were newly discovered (Motion pg. 3, para. 11; Motion Exhibit E). Respondent asserts that it discovered the document in about May,

- 2011. Thus Respondent produced this document almost two years after the alleged conversation took place in June, 2009 (Motion pg. 3, para. 11). Respondent made no showing as to why it could not have introduced this document at trial where it could have been authenticated by Tony.
- 19. Even if Respondent's Exhibit E were in Tony's handwriting, which Respondent has not established, and the document was credited, the document would not have caused the ALJ to alter his determination; therefore, the record should not be reopened to admit it.
- 20. Respondent has not shown that the document purportedly written by Tony would have caused the ALJ to change his conclusion and find that the Union asked to reduce employees' hours (ALJD pg. 21; Motion pgs. 6-7, para. 23). The ALJ correctly discredited Peter, who testified that he reduced wait staff hours due to the Union's request, and that Peter's testimony that the Union "permitted him to manage" the employees' hours in August, 2009 was nonsensical (ALJD pg. 21; Tr. 340, 346, 374, 383, 413).
- On all matters, Peter's testimony was inconsistent: he testified that the Union requested that he reduce the hours of the wait staff, then he stated that the wait staff "liked working long hours," and testified that Jessica refused to return to work unless he allowed her to work more than 40 hours per week (Tr. 339, 409). Then Peter testified that the wait staff and the Union requested overtime, so Respondent gave it to them even though there was no business necessity to do so (Tr. 380-81). Peter also claimed that business fell off in the fall necessitating a reduction in wait staff hours (Tr. 381). Yet the record contained no support for this claim. The restaurant was open the same days and the same number of hours (Tr. 129, 186, 226).
- 22. Despite Respondent's assertion that all wait staff members had their hours reduced, the wait staff that did not support the Union did not have their hours reduced nor did Steven Lam, who Respondent claimed was the head waiter and who it claimed was not a

supervisor, nor did the kitchen staff, as the ALJ appropriately found (ALJD pg. 21; Resp. brief pgs. 6-7; Tr. 130, 158, 186, 226).

23. Nor would Respondent's Exhibit E alter the ALJ's conclusion that Respondent failed to provide the Union with notice or opportunity to bargain over the reduction of days and hours and the parties did not reach agreement on the changes (ALJD pgs. 26-27; Tr. 71, 136,

185). Thus the Exhibit, even if credited would not demand a different result.

24. None of the documents that Respondent now offers would change the ALJ's credibility resolution in Peter's favor; The ALJ correctly found that the corroborated testimony of the Acting General Counsel's witness directly contradict Peter on all important points. The evidence adduced at trial was more than sufficient to show that Peter discharged Jessica, that he refused to reinstate her to her previous position under her previous terms of employment and the ownership of her husband's business, her unemployment records and W-2 statements have no

25. Respondent's proffered documents concern areas that were completely tangential

impact on and no relevance to that conclusion.

to the issues before the ALJ as they are to the case before the Board. The ALJ properly denied

reopening the record to admit Respondent's documents, as should the Board.

Dated at Newark, New Jersey this 19th day of October, 2011.

Respectfully submitted,

Bert Dice-Goldberg

Counsel for the Acting General Counsel